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Nos. 94-1893, 94-1900

In The
Supreme Court of the United States
October Term, 1995

United States of America, *et al.*,
Petitioners,
v.
Chesapeake and Potomac Tel. Co. of Virginia, *et al.*,
Respondents.

National Cable Television Association, Inc.,
Petitioner,
v.
Bell Atlantic Corporation, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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23 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

TABLE OF AUTHORITIES—Continued

Page

Statutes

Administrative Materials

Other Materials

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In seeking affirmance of the Fourth Circuit's invalidation of Section 533(b), Bell Atlantic insists on the most speech-restrictive reading of the statute (BA Br. 36-45) and then, in attacking that interpretation as unconstitutional, only secondarily defends the rationale of the Fourth Circuit (BA Br. 24-25, 27-36). Instead, Bell Atlantic relies primarily on arguments (about strict scrutiny and the advancement of the government interest) that the Fourth Circuit refused to adopt. *Compare* BA Br. 12-18 *with* Pet. App. 20a-33a (strict scrutiny); *compare* BA Br. 21-24, 25-27 *with* Pet. App. 39a (govern-

ment interest). Both parts of this approach, however, are off the mark. First, the statute should not be read, by ignoring one part of it, to ban as much speech as possible, thus inviting constitutional issues that the Commission's recent construction of the full provision serves to avoid. Second, even if Bell Atlantic's more speech-restrictive reading is accepted, the Fourth Circuit was quite correct in recognizing that the validity of the presumptive bar on cable-telephone cross-ownership ultimately comes down to an assessment—a serious assessment—of (a) the adequacy of other possible regulatory checks on the targeted problem of monopoly exploitation and (b) the range and adequacy of alternative avenues of communication left open to the local telephone monopolies. It is simply in the resolution of those issues that the Fourth Circuit went astray.

The Fourth Circuit—even under the most unfavorable reading of the statute, which now is not the governing law as construed by the agency charged with its enforcement—thus made several critical mistakes in its constitutional analysis. On the "narrow tailoring" issue, the court relied dispositively on the availability of alternative regulatory means of attacking the important problems of cross-subsidy and discrimination addressed by the statute (Pet. App. 39a-42a), but it overlooked the central importance to that analysis of assessing the *effectiveness* of such alternative means. *See Turner Broadcasting System v. FCC*, 114 S. Ct. 2445, 2469 (1994). If regulatory solutions were adopted in preference to Section 533(b), the congressional goal of protecting against telephone monopolists' economic abuse through vertical integration would "be achieved less effectively" (*Turner*, 114 S. Ct. at 2469 (internal quotation marks omitted)) than Congress was entitled to demand; and there is no sound basis for holding the contrary as a matter of law. On the "alternative avenues" issue, the Fourth Circuit erred both in fact and in law: it simply overlooked important parts of the actual broad range of avenues of communication left open to local telephone companies like Bell Atlantic; and it mistakenly disregarded the central precedent rele-

vant to judging the legal adequacy of that unrestricted range, *FCC v. NCCB*, 436 U.S. 775 (1978), which held that a company could constitutionally be excluded from publishing a local newspaper while it owned one of the broadcasting franchises in the same community.

Bell Atlantic offers no corrective to these dispositive flaws in the Fourth Circuit's ruling. For those reasons, the challenge to Section 533(b)(1) and (2), if definitively resolved, should be rejected. The provisions justifiably and narrowly target precisely one speech activity—in-region retailing of wire-delivered cable service—that is the very source of the well-recognized problem of otherwise-unpreventable monopoly abuse.

In fact, however, the Court need not resolve that question, because Section 533(b) does not actually impose the "flat ban" that the Fourth Circuit assumed and Bell Atlantic insists it does. The presumptive bar laid down in Section 533(b)(1) and (2) does not stand alone in the statute, but must be read together with Section 533(b)(4), which provides for waivers of the presumptive bar. And the Commission has now recognized, through formal rulemaking, that a flexible construction of the statute's waiver provision is available to allow, under properly tailored regulatory safeguards, precisely what Bell Atlantic accuses the statute of unconstitutionally forbidding—telephone company provision of in-region video programming.

Bell Atlantic, seeking freedom from the very sorts of regulatory safeguards whose availability formed the premise of the Fourth Circuit's ruling, insists that the statute must be read in the most speech-restrictive manner so that it can then be held invalid. But the well-established approach to statutory construction in the face of constitutional concerns is exactly the opposite, and the statutory text readily accommodates a construction that eliminates the Fourth Circuit's constitutional concerns about the broader restriction that it assumed the law imposed. Moreover, Bell Atlantic's new constitutional objection to this construction provides absolutely no ground for a facial invalidation of Section 533(b).

A. Section 533(b)(1) and (2) Survive Intermediate Scrutiny

A statute regulating speech survives intermediate scrutiny if it is narrowly tailored to serve a substantial government interest unrelated to speech and leaves open ample alternative avenues of communication; and the statute is narrowly tailored if the government interest " ' "would be achieved less effectively" ' " by means other than the congressionally chosen ones. *Turner*, 114 S. Ct. at 2469; *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); *United States v. Albertini*, 472 U.S. 675, 689 (1985); *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *see also, e.g., Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995); *Edenfield v. Fane*, 113 S. Ct. 1792, 1798-99 (1993). We agree with Bell Atlantic (*see* BA Br. 19-21) that this standard has real teeth and requires a searching inquiry into the premises of the government action. In this case, however, each element of the test is satisfied.

1. *The Interest Served.* Bell Atlantic does not dispute that the government interest in preventing monopoly abuses like cross-subsidy and access discrimination is an important speech-neutral interest, but it argues that the presumptive cross-ownership bar of Section 533(b) does not serve that interest because the vertical integration targeted by the statute (into unregulated cable service) presents no economic risks not already presented by the activities currently allowed to the local telephone companies (regulated transmission service). BA Br. 21-24, 25-27. This argument is meritless. The evidence in the record, including one of the "undisputed affidavits" of an economic expert (BA Br. 7), attests to the distinctive dangers of regulated monopolists' vertical integration into unregulated retailing. *See* JA 331-36; NCTA Br. 8-12, 37-39. On this point, unsurprisingly, the Fourth Circuit specifically refused to adopt Bell Atlantic's argument (Pet. App. 39a), and the Ninth Circuit expressly rejected the same

contention when made by US West (*US West, Inc. v. United States*, 48 F.3d 1092, 1102 (9th Cir. 1995)). The several interested government agencies, whose views Bell Atlantic elsewhere emphasizes so heavily, also reject the suggestion: the very premise of their legislative proposals—new regulatory safeguards should be adopted if Section 533(b) is repealed—is that vertical integration into cable service presents new, increased problems of monopoly abuse not already presented by the activities currently allowed. *See* NCTA Br. 39 (citing government positions). That is why the Commission has had under way for almost a year a rulemaking proceeding to consider the adoption of such new regulatory safeguards to address the increased problem (short of legislation). *Fourth Further Notice of Proposed Rulemaking*, 10 F.C.C.Rcd 4617, ¶ 34 (1995).

Bell Atlantic simply asks this Court to accept its contrary premise, briefly asserting that there are no common costs (to misallocate) between regulated telephone service and the " 'creation' " of programming. BA Br. 21-22 & n.11. But that is a red herring. What Section 533(b) addresses is not the shooting of movies in Hollywood or the "packaging" of programs in New York for sale to a program retailer, but the direct, wire-based "provision" of any programs or packages to subscribers in the Bell Atlantic region, *i.e.*, the direct retail sale to consumers of a wire-based service.[1] And the evidence in the case, as we

[1] Bell Atlantic's sole citation for its "no common costs" assertion (BA Br. 21-22, citing JA 274-75) makes the same false dichotomy between transmission and "creation and packaging." JA 274. And Bell Atlantic's "no common costs" assertion stands in considerable tension with its argument, in a related context, that vertical integration presents "economies of scope" precisely because of common costs, such as the costs of large computers. *See* Brief of the Bell Company Appellees at 18-19, in *United States v. Western Elec. Co.*, No. 91-5263 (D.C. Cir. Aug. 17, 1992); *see also* J. Thorne, P. Huber, & M. Kellogg, *Federal Broadband Law* § 8.2, at 461-64 & n.13 (1995) (noting that efficiency benefits and common-cost worries are flip sides of the same coin).

have noted, is that the dangers of economic abuse are distinctly greater when the regulated telephone monopolist integrates into a closely related business where it can offer *un*regulated service (the "regulated-unregulated" situation) than when it offers another *regulated* transmission service.[2] That evidence of record is not refuted by what, in the end, is the crux of Bell Atlantic's response—a single paragraph in its legal brief making bold economic assertions but devoid of citation to any evidence (BA Br. 23, second paragraph).[3] Bell Atlantic's error is starkly revealed in its concluding assertion: despite what Bell Atlantic says, a telephone company offering a *regulated* transmission service could *not* "simply charge unaffiliated

[2] This point was elaborated in the principal materials that formed the background to the enactment of Section 533(b) by Congress in 1984—the 1981 FCC staff study and the 1982 Justice Department filings in the Bell breakup case. *See* NCTA Br. 8-12; *see also id.* at 10 n.8. Bell Atlantic's passing reference to what lay behind the *Commission's* original action in *1970* (BA Br. 23), aside from being incomplete (*see* NCTA Br. 5-7), is a diversion.

[3] Although Bell Atlantic intimates otherwise (BA Br. 23, third paragraph), there is no dispute between NCTA and the Government on the only relevant proposition: that entry into cable retailing creates a distinctly new danger of monopoly abuse. And it is absurd to suggest (BA Br. 23, last paragraph) that this Court should find that full, direct control of a vertically integrated retail cable business provides no greater opportunities for economic abuse than offering a regulated facilities-rental service or owning 5% of the business.

In a related attempt to divert the Court's focus from the real issue, Bell Atlantic elsewhere twice makes the misleading and irrelevant assertion that Section 533(b) allows telephone company ownership of a "cable system," *i.e.*, of the physical plant. BA Br. 13-14, 43 n.45. But what is relevant for the economic dangers targeted by the statute, of course, is ownership of the cable *retail business*, *i.e.*, who controls the sale of the service to consumers. That is what Section 533(b) addresses, just as the broadcast-newspaper cross-ownership rule upheld in *NCCB* addresses a broadcaster's ownership of a newspaper business, not its ownership of a building that it might lease to a newspaper company.

video programmers monopoly rates for carriage" (BA Br. 24).[4]

2. *Regulatory Alternatives.* Because Section 533(b)'s presumptive bar on telephone entry into cable thus directly and materially advances the interest in preventing monopoly abuse by the local telephone companies, the real question is whether the Fourth Circuit could properly conclude that other regulatory means are available to advance that interest as effectively as Congress wished—a conclusion the Fourth Circuit drew even while explicitly assuming "that ordinary regulatory oversight is insufficient to guard against telephone company use of cross-subsidization." Pet. App. 39a. Bell Atlantic responds, not by focusing on some as-yet-untried regulatory mechanism for addressing the problem, but chiefly by pointing to existing regulations and asserting that this Court is legally required to find them effective because, Bell Atlantic says, the Government has declared them "effective." BA Br. 24-25, 25-27, 31-32. Section 533(b) cannot be judicially invalidated on this basis.

First, Bell Atlantic has mischaracterized what the Commission and other agencies of the Government have concluded. As the United States explained in its opening brief, the government agencies have concluded that their rules on cross-subsidy and discrimination have reduced

[4] Both cross-subsidy and discrimination in access are forms of the economic abuse attacked by the presumptive cross-ownership bar. As to the latter, the bar serves to ensure non-discriminatory access by cable operators to needed space on telephone poles and also access by programmers to the telephone company's video network, taking away the natural incentive the telephone company has to use its control over access to favor its own programming. *See, e.g.*, US Br. 5, 36-37. Bell Atlantic responds only with the suggestion (BA Br. 28-29), implausible on its face, that there would be *more* outlets for independent programmers if Bell Atlantic can occupy its video capacity itself than if its capacity all had to be devoted to independent programmers. The suggestion is especially peculiar in light of Bell Atlantic's pointed insistence elsewhere in its brief, presumably rooted in practical plans, that it seeks to be able to build only enough capacity for itself. BA Br. 44.

but not eliminated the dangers and that, in *their* view, the reduced risk is now outweighed by the competitive benefits of telephone entry into cable. US Br. 32 n.21. That is not at all the same as concluding that the prevention of the targeted economic abuse would be achieved as effectively without Section 533(b). *Turner*, 114 S. Ct. at 2469. In other words, with respect to the *factual* aspect of "effectiveness," neither the FCC nor other executive agencies have concluded that regulatory checks are fully effective or, indeed, are substantially as effective as the structural bar of Section 533(b)(1) and (2); and with respect to the *value* question of how intolerable is the degree of ineffectiveness and hence the residual dangers of economic abuse (compared with possible benefits of entry), the policy view of executive agencies is not to be preferred to Congress's. *Cf. Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 131-32 (1989) (Scalia, J., concurring) (stressing that deciding how much regulatory ineffectiveness to tolerate is a value judgment; Court makes judgment in strict-scrutiny setting).

Second, the risks of unchecked cross-subsidy and discrimination, resistant to any plausible set of Commission regulatory efforts, are manifestly substantial. The record in this case, decisions by this Court and other courts, and scholarly literature all attest to both the intrinsic unreliability of allocations of common costs between regulated and unregulated enterprises and the persistent difficulty of trying to control cross-subsidy and discrimination in an industry as large, technologically complex, and changing as the telephone industry. *See* NCTA Br. 42-43 & n.37; *Permian Basin Area Rate Cases*, 390 U.S. 747, 804 (1968) (affirming judgment that apportionment of common costs between regulated and unregulated activities is "intrinsically unreliable"). No judicial decision cited by Bell Atlantic remotely touches this point. *See* BA Br. 25 (saying no more than that rules have been "tighten[ed]" or that risks are "significantly *reduced*") (emphasis

added).[5] And Bell Atlantic has essentially no response (*see* BA Br. 32) to the fact that twice in recent years (in 1987 and again in 1993) the General Accounting Office has concluded that cross-subsidy cannot be controlled without direct independent FCC audits and that audit levels are so grossly deficient that each local telephone company could expect to be audited once every 16 years. JA 120; *see* JA 79-101, 118-36. No realistic program of regulatory oversight could leave the risks of uncorrected economic abuse other than substantial.

Bell Atlantic, again departing from the Fourth Circuit, also points to changing forms of price regulation as somehow solving the monopoly-abuse problem. BA Br. 25-27. But Bell Atlantic must choose its words carefully to assert only that the "*traditional* link" between costs and rates has been widely broken, replaced by the different links between costs and rates allowed by varying forms of "price cap" plans. BA Br. 25 (emphasis added). Even Bell

[5] Of the decisions cited by Bell Atlantic that affirmed various aspects of the Commission's rules as not "arbitrary and capricious" in various policy settings (BA Br. 25), none denies, or purports to deny, the existence of a substantial degree of *in*effectiveness of the regulatory solutions even in their own contexts. (In fact, several of the Commission's rules in this area have been held to fail even the highly deferential APA standard. *See California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1427 (1995).) Still less do they consider any of the special problems of telephone entry into cable, which involves (a) distinctly massive investments in new networks, (b) unique problems of access discrimination (because video capacity, unlike non-video capacity, will for a good while into the future be far less than demand, forcing choices among programmers), and (c) a unique threat of competition to the basic telephone business. Unsurprisingly, the Commission has noted that these new regulatory questions are far from settled, but remain open for future study and appropriate action: otherwise, the very existence of the current rulemaking proceeding would be inexplicable. *See Fourth Further Notice of Proposed Rulemaking*, 10 F.C.C.Rcd 4617, ¶¶ 18-41 (1995). As for the several decisions about Section 533(b) cited by Bell Atlantic (*see* BA Br. 25), the courts in those cases conducted no more detailed reviews of FCC regulations than the Fourth Circuit did in this case.

Atlantic does not suggest, and there would be no record basis to suggest, that "pure" price cap regulation has been generally adopted—or adopted anywhere at all, if "pure" is properly understood, in light of the relevant economic purposes, to mean a complete severing of any connection between costs and regulators' rules on current or future rates. To the contrary, the record makes clear that existing price cap plans *do* generally retain a connection between rates and costs, albeit a different form of connection than under classic forms of rate-of-return regulation. *See* JA 254, 262-64.[6] Nor is there any precedent for Bell Atlantic's apparent suggestion (BA Br. 26) that the government must sacrifice *other* wholly legitimate policy interests in order to minimize any impact on speech—here, the complex policies supporting the choice of retaining a cost basis for monopolists' rates (*see, e.g., Symposium on Price-Cap Regulation*, 20 Rand J. Econ. 369-472 (1989)). The narrow-tailoring component of intermediate scrutiny provides for judicial testing of the "fit" between the government measure and the governmental interest; it does not allow for the courts to force different policy choices by the government that sacrifice other legitimate interests.

Finally, Bell Atlantic seeks support for the assertion of regulatory adequacy (as a matter of law) in the D.C. Circuit's decision in *United States v. Western Elec. Co.*, 993 F.2d 1572, *cert. denied*, 114 S. Ct. 487 (1993), which affirmed a voluntary consent-decree modification to allow telephone entry into information services. BA Br. 30-31. But this reliance is badly misplaced, even aside from the facts that the telephone-cable setting presents uniquely grave risks of cross-subsidy and access discrimination (*see* note 5, *supra*) and that *reduction* of the risks was all that the Government asserted, as one factor in a complex policy balance (*see* 993 F.3d at 1578). Bell Atlantic has grossly misdescribed what the D.C. Circuit held. The court did not "endorse[]" the Government's determinations (BA Br. 30) or hold that any contrary findings "'[would have been] clearly erroneous'" (BA Br. 31). Rather, the D.C. Circuit repeatedly stressed, as Bell Atlantic itself urged (*see* NCTA Br. 43-44), that the judicial role on this complex policy question was limited to assessing the "reasonableness" of the Government's determinations—not the unreasonableness or even incorrectness of contrary views, which the court acknowledged might well be right—and held only and precisely that the district court had been "clearly erroneous *to the extent that it found the Department's conclusion unreasonable.*" 993 F.3d at 1578 (emphasis added); *see id.* at 1581, 1582. That deliberately limited conclusion furnishes no support for declaring regulatory oversight adequate as a matter of law to protect against the risks of monopoly abuse at the level of effectiveness that Congress, as a policy matter, is entitled to choose. Once the policy

[6] *See also Video Dialtone Reconsideration Order*, 10 F.C.C.Rcd 244, ¶ 154 (1994) ("The LEC price cap plan . . . retains a connection between total interstate costs and overall rate levels by means of sharing and lower end adjustment mechanisms."); J. Thorne, P. Huber, & M. Kellogg, *supra*, § 8.2, at 460 ("Existing forms of price-cap regulation are not pure; they provide for periodic adjustments based on costs.").

Bell Atlantic, in a footnote, makes the undocumented assertion, with respect to intrastate telephone rates, that 15 out of 51 jurisdictions now "have adopted pure price caps for intrastate services"; with respect to interstate rates, it refers to certain FCC regulatory developments that post-date the compilation of the record in this case. BA Br. 26 n.17. But Bell Atlantic's claims have no relevance here. Any factual developments that are not part of the record below, which necessarily have not been subject to any adversarial testing, may be grounds for reconsideration of the legal issues on a different record, but they are not properly considered in reviewing the district court's grant of summary judgment that is before this Court. *See, e.g., Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37 (D.C. Cir. 1987) (per Starr, J.), *cert. denied*, 484 U.S. 1066 (1988); 10 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2716, at 650-54 (2d ed. 1983). In any event, Bell Atlantic's unelaborated assertions embody a highly contentious, and in our view incorrect, view of what "pure" price cap regulation is: for example, the FCC plan that Bell Atlantic describes in fact allows for future adjustments based on costs. Of course, by Bell Atlantic's own figures, most States fail to meet even Bell Atlantic's standard for price caps.

choice is properly left to Congress, it is clear that Section 533(b)(1) and (2) do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. at 799.

3. *Alternative Avenues of Communication*. Bell Atlantic also contends that the presumptive cross-ownership bar "does not leave telephone companies with adequate alternatives for delivering their video speech." BA Br. 34; *see id.* at 34-36. This contention, like the Fourth Circuit's conclusion to the same effect, should be rejected because it rests on both factual and legal errors. The Fourth Circuit, notably, ignored some of the key avenues for speech now acknowledged by Bell Atlantic. The actual full range of alternatives left open to telephone companies like Bell Atlantic should be deemed adequate, and Section 533(b)(1) and (2) upheld as no more burdensome of speech than necessary to serve the important speech-neutral consumer-protection interests underlying the statute.

Section 533(b)(1) and (2), to begin with, leave open all non-video programming everywhere as well as all video programming outside the telephone-monopoly region, *i.e.*, in more than 85% of the country. For the remaining households within its telephone-monopoly region, Bell Atlantic is pointedly *not* excluded from the "most important medium of communication" (BA Br. 9), *i.e.*, "video programming" (JA 152, cited at BA Br. 9)—not even from multichannel video programming. Thus, one step removed from consumers, Bell Atlantic may, like any other independent program creator, create programs or packages of programs to sell to independent cable retailers, broadcasters, satellite services, or wireless cable services.[7] And Bell Atlantic also may provide its video programming *directly* to consumers in various ways, with no intervening editorial control: for example, it may become a broadcaster, a provider of direct broadcast satellite service (DBS), or (as it has) a provider of "wireless cable" service (MMDS). The last of those options, all by itself, is capable of reaching 75% of the in-region homes. BA Br. 36 n.29. The only avenue foreclosed by Section 533(b)(1) and (2) is the specific source of the economic problem for the telephone monopolist, in-region wire-delivered direct retailing of video programming.

The range of speech thus left open not only is very wide, but is legally "adequate" under the central governing precedent. Bell Atlantic argues that the foreclosure at issue here is no more defensible than "a law prohibiting the *Washington Post* from publishing a newspaper." BA Br. 11. But this Court in *FCC v. NCCB*, of course, unanimously held that the Washington Post Company *could* constitutionally be prohibited from publishing a newspaper in any community where it also ran a television station. And while Bell Atlantic tries to disregard *NCCB* (BA Br. 14 n.10), it is hard to imagine how a bar on participating in one aspect of the multichannel video programming business (on condition of giving up an activity that is not protected by the First Amendment, *i.e.*, telephone common carriage) could be any *more* problematic constitutionally than a bar on participating in the *newspaper* business (on condition of giving up an activity that *is* protected by the First Amendment, *i.e.*, broadcasting). The avenues of speech left open to Bell Atlantic are ample on their own terms and *a fortiori* adequate under *FCC v. NCCB*.

B. Under Applicable Precedent, Strict Scrutiny Does Not Apply to Section 533(b).

The Fourth Circuit rejected Bell Atlantic's argument for strict scrutiny. Pet. App. 20a-33a. Disagreeing with

[7] As a practical matter, it is hard to imagine how Bell Atlantic, if it plans to offer programming popular enough that it would be genuinely competitive, would have any trouble finding a retailer desiring to purchase the programming. And although Bell Atlantic cites past problems with use of the leased access rights provided by 47 U.S.C. § 532 (*see* BA Br. 35 n.28), its own evidence indicates that the Commission has addressed the matter since the 1992 Cable Act. *See* JA 289-90.

the Fourth Circuit, and joined by no other court to have addressed the issue, Bell Atlantic seeks to resuscitate its grounds for strict scrutiny. BA Br. 12-18. Under applicable precedent, the claim to strict scrutiny is devoid of merit.

Bell Atlantic first argues for strict scrutiny based on the notion that Section 533(b) is a "direct ban on speech and nothing but speech." BA Br. 12. But as a factual matter, even aside from the waiver provision, Section 533(b) does not ban the telephone companies from speech, even from in-region video speech, as we have just discussed. In any event, none of the decisions cited by Bell Atlantic in support of this argument either invokes strict scrutiny or strikes down a measure under strict scrutiny, where the measure was justified on the basis of a speech-neutral government interest and not an interest in altering the content of speech. *See* BA Br. 12-13. Of course, a government measure may fail to pass intermediate scrutiny itself, on the merits, if it is simply too sweeping in its effects on speech, for it is then not a "reasonable" restriction on the time, place, or manner of speech.[8] This Court's precedents, however, do not supply a separate category of strict scrutiny for "direct bans." *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) ("direct ban" on signs upheld under intermediate scrutiny).

[8] Aside from decisions involving explicitly content-based statutes (*Buckley v. Valeo*, 424 U.S. 1 (1976)) or unduly discretionary regimes struck down precisely because of the serious potential for content-based restrictions (*City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988)) or restrictions of speech justified by no government interest at all except an interest in message alteration (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338, 2350 (1995)), Bell Atlantic relies only on decisions that nowhere invoke strict scrutiny but, instead, seem to accept the "*reasonable* time, place, or manner" standard but then find, on the merits, that the standard was not met because the governmental restriction was too sweeping to be reasonable. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74-76 (1981); *Martin v. City of Struthers*, 319 U.S. 141, 147 (1943); *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2046 (1994).

Bell Atlantic also argues that Section 533(b) is content-based. BA Br. 16-18. But, as the Fourth Circuit held, this contention is impossible to square with *Turner*, because Section 533(b) is in no way concerned with or addressed to the subject matter or message (much less viewpoint) of the speech; it is, rather, designed to serve speech-neutral economic interests, which, of course, require an "industry" or "business" definition. *See* BA Br. 20 (conceding that Section 533(b) is not aimed at any harm from the speech itself, but at economic problems). If the statute's use of "video programming" for that purpose renders it content-based, then the must-carry law at issue in *Turner*, and the entire Cable Act, are content-based, because "cable operators" and "cable service" are themselves defined in terms of "video programming." 47 U.S.C. § 522.[9] As long as *Turner* is good law, there is no argument for strict scrutiny here.

C. The Waiver Provision of Section 533(b)(4), Permissibly Construed to Narrow the Restrictions on Telephone Entry Into Cable, Eliminates Any Facial Constitutional Difficulty.

Bell Atlantic is not entitled to an affirmance of the Fourth Circuit's facial invalidation of Section 533(b) for another reason: the court of appeals' (and Bell Atlantic's) analysis focuses exclusively on the presumptive bar set forth in Section 533(b)(1) and (2) and utterly ignores the waiver authority set forth in Section 533(b)(4). In fact, the Commission has construed the waiver provision, in recognition of First Amendment concerns, to *allow* in-region telephone entry into cable, under regulatory standards that are themselves subject to constitutional requirements. Quite simply, if the entirety of Section 533(b) is suitably read, as the Commission has done, the premise

[9] There is no realistic concern in this facial challenge that FCC discretion over line-drawing will be used to influence content: Bell Atlantic has not remotely shown that its programming, to be offered to compete with existing cable service, will come anywhere near any definitional line or require governmental judgments at all.

of the Fourth Circuit's ruling and of Bell Atlantic's attack—that the statute bans in-region entry—is eliminated. The statute before this Court is not the statute that the Fourth Circuit assumed or Bell Atlantic challenges.

Although Bell Atlantic makes a half-hearted attempt to suggest otherwise (BA Br. 39-40), the text of Section 533(b)(4) plainly is no less accommodating of a broad definition of "good cause"—broad enough to accomplish the very narrowing the Fourth Circuit called for—than the statutory texts construed in other decisions of this Court under the principle commanding avoidance of constitutional difficulties where possible. *See, e.g.*, NCTA Br. 26-27.[10] Given that principle, it would be perverse to declare that the avoidance of constitutional difficulties is anything other than "good cause," especially under Bell Atlantic's view that the statutory policy of fair competition would be served, rather than defeated, by telephone entry. The Commission's recent formal rulemaking makes clear that a broad "saving" construction of the Act is fully consistent with the statute. *See* Pet. App. 111a-120a.[11]

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[10] In Bell Atlantic's only reference to the text (BA Br. 40), it transforms a provision that actually refers to "particular" circumstances into one referring to "exceptional" circumstances and, in addition, treats the provision as a limit on FCC authority when it is actually a directive for mandatory waivers. *See* 47 U.S.C. § 533(b)(4). Bell Atlantic points to certain decisions involving other uses of "good cause" (BA Br. 40 n.37), but context surely plays a large role in determining the meaning of such a phrase, and constitutional concerns, wholly absent in the cited decisions, play an even larger role.

[11] Bell Atlantic protests that the new Commission construction is a change from prior constructions and is inconsistent with a prior D.C. Circuit decision. BA Br. 41, 40. But in addition to the fact that the departure from prior practice is overstated (*see* NCTA Br. 7-8), the Commission is of course fully entitled to alter its interpretation even aside from constitutional concerns (*e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 49, 57 (1983)), and both changed circumstances and newly presented constitutional issues can supply ample justification for a

Bell Atlantic, rather than welcoming the Commission's loosening of restrictions on its speech in light of Bell Atlantic's asserted First Amendment interests, instead attacks the Commission's construction as the equivalent of a defendant's "voluntary cessation" of challenged activity, which sometimes fails to moot a case. BA Br. 37-39. But even on its own terms the analogy is unhelpful, because Bell Atlantic cannot seriously contend, in light of the Commission's policy analysis and commitments, that this case presents one of the " 'exceptional situations' " where there is a " 'reasonable expectation' " of a return to the earlier legal position. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990). In any event, the mootness analogy is beside the point, because the relevance of the Commission rulemaking is not to suggest mootness but instead to demonstrate that, if constitutional difficulties are found in Section 533(b)(1) and (2), the statute is capable of being construed to avoid them—through a flexible reading of Section 533(b)(4). The Commission's rulemaking shows that this is more than possible.

Bell Atlantic argues that the saving construction of the statute must be rejected because a flexible reading of Section 533(b)(4) vests too much discretion in the Commission and because the Commission has not yet defined the conditions for telephone companies' speech on their own joint voice-video networks. BA Br. 42-45. But, even aside from the fact that the Commission's construction unmistakably does allow in-region video programming by the telephone companies, the only real question in determining the facial validity of the statute is whether the Commission *could* adopt constitutional, discretion-limiting rules defining the reach of the waiver authority: this Court has

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change. As for the relied-on D.C. Circuit decision, Bell Atlantic has patently overread the court's holding; the case involved no constitutional argument; and the decision is hardly binding on this Court. *See* NCTA Br. 34 (discussing decision); Pet. App. 120a-121a.

made clear, in the very precedent that Bell Atlantic cites, that discretion in administration may be properly limited, for First Amendment purposes, by "binding judicial or administrative construction, or well-established practice." *City of Lakewood*, 486 U.S. at 770. Bell Atlantic may, of course, challenge the adequacy of the Commission's rules (on First Amendment or other grounds) or even the dispatch with which the Commission adopts them.[13] But Bell Atlantic is distinctly ill-situated to make any challenge to the present adequacy of the Commission's detailed standards for telephone companies' provision of programming on their own networks: together with other local telephone companies, Bell Atlantic this summer specifically asked the Commission to delay its announcement of the new regulatory standards that were on the Commission's agenda for action. *See* "Bell Atlantic Campaigns Against Dual Regulation," *Washington Post*, July 20, 1995, at D9 (proposing delay); "USTA Asks for Delay," *Communications Daily*, July 19, 1995, at 3 (same). In sum, Section 533(b)(4) remains available, if properly construed and implemented, to "save" the statute from any constitutional problems.

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[13] Challenges to Commission action may not be brought in district court, but are within the exclusive jurisdiction of the courts of appeals. 47 U.S.C. § 402(a); 28 U.S.C. § 2342; *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Of course, if Bell Atlantic believes that the formulation of new discretion-limiting rules has been "unreasonably delayed," it may seek review on that basis. 5 U.S.C. § 706(1); *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 76-81 (D.C. Cir. 1984).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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